Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd

SUPREME COURT (IPOH) — CIVIL APPEAL NO 03-86-1992
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
9 JULY 1993

Civil Procedure *— Pleadings — Striking out counterclaim and defence to counterclaim — Principles applicable — Whether claim or answer was on the face of it 'obviously unsustainable' — Rules of the High Court 1980 O 18 r 19*

Civil Procedure *— Pleadings — Striking out counterclaim and defence to counterclaim — Whether counterclaim and defence to counterclaim have raised issues which require serious consideration*

The respondent had granted banking facilities to the first appellant, ie a secured overdraft facility, a letter of credit facility, a trust receipt facility and a letter of guarantee facility. The facilities were secured by legal charges over several pieces of land and guaranteed by the second and third appellants and another person, since deceased. Originally, it was agreed between the parties that the letter of guarantee facility would be secured by personal guarantees of the second and third appellants and a counter-indemnity of an insurance company. Later, the parties agreed that the said letter of guarantee facility be secured up to 50% of its value by a fixed deposit of RM1,597,000 and legal charges over various pieces of land as security for RM530,000. However, the securities were later varied whereby the fixed deposit was replaced with public-listed shares having a market value of approximately RM2m. Consequently, the respondent recalled the overdraft and trust receipt facilities. There was subsequently an exchange of communication between the parties for the respondent to dispose of the shares pledged as settlement of the appellants' liabilities.

The respondent claimed against the appellants for recovery of the amount due and owing under the various banking facilities with interest. The appellants filed their defence and counterclaim and later an amended defence and counterclaim, in which they stated that as a consequence of the respondent recalling the said facilities, the appellants on two occasions sought the respondent's permission to dispose of all the said shares pledged with the respondent, which at the material time was quoted at RM2.40 per share. The respondent only agreed to sell RM1.75m worth of the shares. The appellants therefore averred that the respondent, in breach of their duty of care which arose from the agreement to sell the shares, unreasonably delayed the granting of the approval for the disposal of the shares, until some months later when the said shares dropped in value. The appellants averred that as a direct and foreseeable consequence of the respondent's failure to promptly approve the sale of the shares and in breach of their duty to sell the said shares, they had caused the appellants to suffer loss and

damage in not being able to dispose of the entire shares at a price which would have resulted in gross receipts which would be more than sufficient to repay the banking facilities. In their reply to the counterclaim, the respondent denied that there was a duty of care which existed between them. The respondent also maintained that there was no concluded agreement reached relating to the sale of the shares to settle the liabilities of the appellants. The appellants subsequently filed their application to strike out the respondent's reply and defence to the counterclaim and the respondent in turn filed an application to strike out the counterclaim. The Registrar refused the applications and the High Court on appeal dismissed the appeals. The parties have appealed.

Held, dismissing the appeals:

(1) The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

(2) Both the counterclaim and the defence to the counterclaim have raised some issues which required serious consideration. This was not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court.

[Bahasa Malaysia summary

Responden telah memberi kemudahan perbankan kepada perayu pertama, iaitu kemudahan overdraf bercagar, surat kemudahan kredit, kemudahan penerimaan amanah dan kemudahan surat jaminan. Kemudahan-kemudahan itu telah dicagar oleh gadaian sah atas beberapa bidang tanah dan dijamin oleh perayu kedua dan ketiga dan seorang lagi, yang telahpun meninggal dunia. Pada mulanya, pihak-pihak telah bersetuju bahawa kemudahan surat jaminan itu hendaklah dicagar oleh jaminan peribadi perayu kedua dan ketiga dan indemniti balas sebuah syarikat insurans. Kemudiannya, pihak-pihak itu telah bersetuju supaya kemudahan surat jaminan itu dicagar setakat 50% nilainya oleh simpanan tetap sebanyak RM1,597,000 dan suatu gadaian sah atas beberapa bidang tanah sebagai jaminan untuk RM530,000. Akan tetapi, cagaran itu kemudiannya diubah, di mana simpanan

tetap itu telah diganti dengan saham disenarai awam yang mempunyai nilai pasaran hampir RM2 juta. Kemudiannya, responden telah menarik balik kemudahan overdraf dan penerimaan amanah. Selepas itu, terdapat perhubungan sambil balas antara pihak-pihak itu supaya responden menjual saham-saham yang disandarkan itu untuk menyelesaikan hutang perayu.

Responden telah menuntut daripada perayu jumlah wang yang kena dibayar dan yang terhutang di bawah kemudahan-kemudahan pinjaman bank itu termasuk bunga. Perayu telah memfailkan pembelaan dan tuntutan balas dan kemudiannya suatu pembelaan dan tuntutan balas pindaan, di mana mereka menyatakan bahawa disebabkan penarikan balik kemudahan-kemudahan itu, perayu telah dua kali meminta kebenaran responden supaya menjual semua saham yang telah disandarkan kepada responden, yang pada masa yang berkenaan berharga RM2.40 sesaham. Responden hanya bersetuju menjual saham-saham yang bernilai RM1.75 juta. Oleh itu, perayu telah mendakwa bahawa responden telah melanggar kewajipan mereka untuk berjaga-jaga yang timbul akibat daripada persetujuan untuk menjual saham tersebut, dan dengan tak munasabah telah melambatkan pemberian kebenaran untuk penjualan saham-saham itu, hingga beberapa bulan kemudian apabila saham itu telah jatuh harganya. Perayu telah mendakwa bahawa akibat langsung dan boleh-ramal kegagalan responden untuk memberi kebenaran mereka supaya saham-saham itu dijual dengan segera dan kemungkiran kewajipan mereka kerana tidak menjualkan saham-saham itu, telah menyebabkan perayu mengalami kerugian kerana mereka tidak dapat menjual saham-saham itu dengan harga yang boleh membawa kepulangan harga yang lebih daripada mencukupi untuk membayar balik kemudahan-kemudahan hutang bank itu. Di dalam jawapan mereka kepada tuntutan balas itu, responden telah menafikan kewujudan kewajipan berjaga-jaga antara mereka. Responden juga menegaskan bahawa tidak terdapat perjanjian muktamad antara mereka mengenai penjualan saham-saham itu untuk menyelesaikan hutang perayu. Perayu kemudiannya telah memfailkan permohonan untuk membatalkan jawapan dan pembelaan responden terhadap tuntutan balas mereka dan responden pula memfailkan permohonan untuk membatal tuntutan balas itu. Pendaftar telah menolak kedua-dua permohonan itu dan Mahkamah Tinggi telah menolak rayuan yang telah dibuat. Pihak-pihak telah membuat rayuan.

Diputuskan, menolak rayuan-rayuan itu:

(1) Prinsip-prinsip atas mana mahkamah bertindak apabila menggunakan kuasanya di bawah mana-mana satu perenggan A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 adalah jelas. Proses terus di bawah kaedah ini patut digunakan di dalam kes-kes yang terang dan nyata sahaja dan prosedur terus ini hanya boleh digunakan apabila jelas bahawa sesuatu tuntutan atau jawapan adalah pada wajahnya 'obviously unsustainable'. Ia tidak boleh digunakan dengan pemeriksaan rapi dokumen-dokumen

dan fakta-fakta kes itu untuk melihat sama ada pihak yang berkenaan mempunyai suatu kausa tindakan atau pembelaan.

(2) Kedua-dua tuntutan balas dan pembelaan kepada tuntutan balas itu telah menimbulkan beberapa isu yang memerlukan pertimbangan yang serius. Ini tidak merupakan suatu kes yang terang dan nyata untuk membatal pliding itu sebagai tidak menzahirkan kausa tindakan atau pembelaan yang munasabah. Selagi pliding itu mendedahkan sesuatu kausa tindakan atau menimbulkan persoalan yang patut diputuskan oleh hakim, hakikat bahawa kes itu adalah lemah dan tidak mungkin berjaya pada perbicaraan tidak menjadi alasan supaya pliding itu dibatalkan. Tidak boleh dikatakan pliding-pliding itu adalah sia-sia, menyusahkan atau boleh memudarat, menghalang atau melambatkan perbicaraan sewajarnya perkara itu atau bahawa pliding-pliding itu adalah sebaliknya suatu penyalahgunaan proses mahkamah.]

Notes

For cases on striking out of a counterclaim, see 2 *Mallal's Digest* (4th Ed) paras 1784 & 1796.

For cases on striking out of a defence, see 2 *Mallal's Digest* (4th Ed) paras 1785–1798.

Cases referred to

1 *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 (refd)
2 *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* [1979] Ch 384 (refd)
3 *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 (refd)
4 *National Society for the Distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280 (refd)
5 *China and South Sea Bank Ltd v Tan Soon Gin @ George Tan* [1990] 1 AC 536 (refd)
6 *Malaysia Air Charter Sdn Bhd v Standard Chartered Bank* (Civil Appeal No 02–259–1989) (unreported)
7 *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 (refd)
8 *AG of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274 (refd)
9 *Wenlock v Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871 (refd)
10 *Moore v Lawson* [1915] 31 TLR 418 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No D1–23–2927 of 1988 (High Court, Kuala Lumpur)

G Sri Ram (*PS Gill* with him) (*Gill & Tang*) for the appellants. A

Hira Singh (*Asbir Kaur* with him) (*Asbir, Hira Singh & Co*) for the respondents.

Cur Adv Vult

B

Mohamed Dzaiddin SCJ (delivering the judgment of the court): These are two appeals against the decision of Shaik Daud J, given in chambers on 27 August 1992, on an appeal from the registrar's decision, refusing to strike out the counterclaim and the reply and defence to counterclaim made pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC').

Since we are concerned here with the question of striking out pleadings C under O 18 r 19, we do not propose to go into the facts and documents in any more detail than is necessary. From the writ of summons and the statement of claim, it is clear to us that the respondent's claim against the appellants in this civil suit is for recovery of the amount due and owing under the various banking facilities as at 30 September 1988 with interest, granted by the respondent to the first appellant and guaranteed by the D second and third appellants and one Kuah Sai Yok (deceased). The following facts are not in dispute. As at 16 July 1984, the following facilities were granted to the appellants:

(a) a secured overdraft facility (OD) of RM750,000;
(b) a letter of credit facility (LC) of RMlm; E
(c) a trust receipt facility (TR) of RM500,000; and
(d) a letter of guarantee facility (LG) of RM3.5m.

The above facilities were secured by legal charges over several pieces of land and a duly executed letter of guarantee and indemnity of the second and F third defendants and Kuah Sai Yok (deceased) dated 10 September 1984. Originally, it was agreed between the parties that the LG facility would be secured by personal guarantees of the second and third appellants and a counter-indemnity of an insurance company. Later, the parties agreed that the said LG facility be secured up to 50% of its value by legal charges over various pieces of land as security for RM530,000 and by a fixed deposit of G RM1,597,000.

However, on 5 November 1985, the securities were varied, whereby the fixed deposit of RM1,597,000 was replaced with public-listed shares having a market value of approximately RM2m. Consequently, on 7 May 1987, the respondent recalled the OD and TR facilities. It is also common ground that between 13 May 1987 and 9 August 1988, there were exchanges of H communication between the parties for the respondent to dispose of the shares pledged as settlement of the appellants' liabilities.

From the pleadings, we note that the respondent filed the present action on 24 November 1988, and on 9 January 1989, the appellants filed their defence, which was amended on 5 March 1990 to include the counterclaim. I On 30 June 1990, the respondent filed their reply and defence to counterclaim. Finally, on 5 November 1990, the appellants, pursuant to an order of court of even date, filed a further amended defence and counterclaim. In the further amended defence and counterclaim, the appellants stated

that as a consequence of the respondent recalling the said facilities, the appellants on two occasions sought the respondent's permission to dispose of all the said shares pledged with the respondent which, at the material time, were quoted at RM2.40 per share and therefore necessarily indicated that the sale of the said shares would fetch moneys which would then be utilized to repay the OD and TR facilities. Prior to the appellant's second appeal for permission to sell the said shares, the respondent agreed to sell only RM1.75m worth of the shares and they did not allow the first appellant to sell the balance of the said shares in order to repay the recalled facilities. The appellants therefore averred that the respondent, in breach of their duty of care, unreasonably delayed the granting of the approval for the disposal of the said shares until some five months after the share market crashed in October 1987, resulting in the said shares falling in value.

By their counterclaim, the appellants repeated these allegations and averred that as a direct and foreseeable consequence of the respondent's failure to promptly approve of the sale of the shares and in breach of their duty of care in failing to sell the said shares, they had caused the appellants to suffer loss and damage in not being able to dispose of the entire shares at a price which would have resulted in gross receipts which would be more than sufficient to repay the banking facilities. The first appellant would have had an additional RM1,880,561.07. Further, the appellants averred that as a result of the respondent's negligence, they had suffered loss in the form of interest and a further loss by way of interest charged by the respondent against the OD and TR facilities. Wherefore the appellants prayed for judgment in the sum of RM1,880,561.07 being the balance of proceeds of sale of shares after discharging their liability under the various banking facilities, interest, damages and costs.

In the reply and defence to counterclaim, the respondent denied that they were under a duty in law to the first appellant to sell the shares or to allow the first appellant to sell the said shares as and when demanded by the company. They averred that upon the first appellant's application to the respondent to be allowed to dispose of shares pledged to them to secure the facilities, the respondent agreed by a letter dated 16 May 1987 to the disposal of a portion of the shares upon the terms and conditions stated therein. They alleged that in any event, those terms and conditions were never met by the first appellant. The respondent further averred that it was a condition of the said banking facilities that these facilities were repayable on demand by them at any time. It was also a condition of the said facilities that a correct account was to be operated actively and satisfactorily and within the limit, and that payments of all bills must be prompt. The respondent maintained that the first appellant had failed to settle the overdue bills despite requests from them. Lastly, the respondent maintained that they were under no duty in law at all material times to allow the first appellant to liquidate the shares until the outstanding facilities had been repaid in full by the first appellant.

The next move taken by each side was to file their respective applications to strike out the pleadings. On 11 July 1990, the appellants filed their application to strike out the respondent's reply and defence to counterclaim and on 2 November 1991, the respondent filed their application to strike

out the counterclaim. Needless to say, their respective applications are supported by several affidavits.

A *Appellants' case*

Before us, learned counsel for the appellants submitted that the counterclaim of the appellants raised a fundamental issue, which is, whether the respondent was at all material times under a legal duty to immediately sell the shares pledged which was allegedly agreed between the parties on 27 March 1990 and to apply the proceeds of the sale to settle the liabilities of the appellants under the original agreement. Counsel stressed that as at 27 March 1990, there was a concluded agreement reached whereby the shares would be sold immediately. Thus, having agreed to sell these shares 'immediately', which was submitted to mean 'forthwith', it was not open to the respondent to claim that they had received no instructions from the pledger of the shares nor was it for them to deny that they had a duty to sell which duty arose from the agreement to sell. Wherever a relationship in contract exists, the duty of care arises (see *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor*[1]). In any event, counsel submitted that the respondent owed the appellants a duty of care by reason of the relationship of pledgor and pledgee which was independent of any duty in contract, relying on *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp*.[2] Counsel also referred to ss 125–130 of the Contracts Act 1950 on the law relating to pledge.

For the above reasons, counsel respectfully submitted that the learned judge erred in failing to consider the appellants' counterclaim separately, as it was a separate and independent action by the appellants against the respondent. Even though there were triable issues in respect of the respondent's main claim against the appellants, the court could still exercise its powers under the rule to strike out the defence to counterclaim of the respondent as it was shown that the respondent had failed to disclose a reasonable defence to the appellants' counterclaim (*Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd*[3]).

With respect to the respondent's appeal from the decision refusing to strike out the appellants' counterclaim, learned counsel raised a preliminary point that this purported cross-appeal should have been commenced by the respondent filing a separate notice of appeal for that purpose. The respondent was not entitled by way of cross-appeal to attack the decision of the learned judge. Counsel relied on *National Society for the Distribution of Electricity by Secondary Generators v Gibbs*.[4]

B *Respondent's case*

In his written submissions, counsel for the respondent stated that the triable issues which arose in these pleadings were as a result of the deposit by the second appellant and another person to the respondent of 1,528,189 YTL shares. The appellants alleged that the respondent's disposal of these shares was delayed by the respondent to the detriment of the appellants. Counsel pointed out that the appellants seemed to rely on the alleged agreement concluded on 27 March 1990. However, despite the pleadings having been amended on three occasions, the appellants had not pleaded the alleged

agreement to sell these shares on 27 March 1990. The respondent, in the reply and defence to counterclaim, had not only denied the said agreement but also alleged that they were not under any duty of care to the appellants either to sell or allow the first appellant to dictate the terms of the sale until the total outstanding LG facilities were repaid in full because the respondent had not until the default, any powers under the memorandum of deposit to dispose of the said shares. In the circumstances, counsel submitted that the issue of whether the respondent were at all material times under a duty in law to immediately sell the shares as allegedly agreed on 27 March 1990 and to apply the proceeds of sale towards repayment of the loan did not arise because this point was never pleaded in their pleadings. Counsel then referred to the correspondence exchanged between the parties. In the light of these letters, counsel submitted that there was never ever an agreement known to the law.

Counsel further argued that the alleged causes of action as pleaded in the appellants' counterclaim were not known to law and therefore unsustainable. Counsel relied on *China and South Sea Bank Ltd v Tan Soon Gin @ George Tan*,[5] where the Privy Council had held that the creditor owed no duty to the surety and that the bank could exercise its power of sale over the pledged securities and could decide in its own interest whether to sell and when to do so. According to counsel, the case was followed by this court in *Malaysia Air Charter Sdn Bhd v Standard Chartered Bank*.[6]

Thus, upon the facts and the several allegations pleaded in the respective pleadings of the parties, which we have highlighted above, can it be said that the counterclaim and the defence to counterclaim disclosed no reasonable cause of action or defence, as the case may be, for this court to exercise its power to strike out the pleadings under O 18 r 19(1)(a)? Secondly, based on the competing affidavits of the parties, can this court exercise its power under the said Order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court under r 19(1)(b), (c) or (d) of O 18?

The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*)[7], and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*[8]). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*[9]). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*[7]). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

After considering the counterclaim and the defence to counterclaim, we are satisfied that both pleadings have raised some issues which require serious discussion. The appellants alleged that the respondent owed them a legal duty of care which arose from an agreement to sell the public-quoted shares belonging to the appellants and, that as a result of unreasonable delay in granting the approval to sell, they have suffered loss and damage. The respondent, on the other hand, denied that a duty of care existed between them. Furthermore, there is also a dispute on fact concerning the alleged agreement on 27 March 1990. The respondent maintained that there was no concluded agreement reached between the parties on 27 March 1990. Here, the parties relied on the correspondence in the respective affidavits filed in the action. This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v Lawson*[10] and *Wenlock v Moloney & Ors*[9]).

Bearing in mind the established principles stated above, we say that this is not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. Nor can we say that they are frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court. Accordingly, we dismiss both appeals with costs.

Appeals dismissed.

Reported by Prof Ahmad Ibrahim